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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SBD MUFFLERS, LLC,

Plaintiff, Cross-defendant and
Appellant,

v.

CAR SOUND EXHAUST SYSTEM,
INC.,

Defendant, Cross-complainant and
Respondent.

G039016

(Super. Ct. No. 05CC04901)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John M. Watson and Daniel J. Didier, Judges. Affirmed.

Law Offices of George B. Piggott, George B. Piggott; Quest Law Firm and Robert C. Robinson for Plaintiff and Appellant.

Rutan & Tucker, Treg A. Julander; Gigliotti & Gigliotti, Joseph J. Gigliotti; Law Offices of Douglas Sanderson Smith and Douglas Sanderson Smith for Defendant and Respondent.

Plaintiff SBD Mufflers, LLC sued defendant Car Sound Exhaust System, Inc. seeking damages for defendant's alleged breach of a contract to manufacture an after-market muffler it had designed. After the trial court issued rulings that found (1) plaintiff's muffler violated Vehicle Code section 27150, subdivision (a) (section 27150(a); all further statutory references are to the Vehicle Code unless otherwise indicated) and, (2) section 27150.1 rendered the parties' contract illegal to the extent the mufflers were to be sold in California for use on registered vehicles, the parties stipulated to a judgment for defendant on the complaint and its cross-complaint to expedite this appeal.

On appeal, plaintiff asserts the following grounds for reversal: (1) Its muffler does not violate section 27150(a); (2) the parties' contract was not illegal; and (3) assuming the trial court properly found the muffler violates section 27150(a), that statute is invalid under either or both the United States Constitution's commerce and supremacy clauses. Finding all of these contentions without merit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the legality of a glass pack muffler design. According to the appellate record and briefs, unlike a standard muffler that contains baffles to restrict the flow of exhaust gases and acoustic noise, a glass pack muffler contains a perforated metal tube surrounded by sound-absorbing material encased in a steel or aluminum case. Glass pack mufflers "generate[] less restriction to flow so that back pressure is not as high as . . . in a restricted type muffler," thereby providing more horsepower as well as noise.

Plaintiff's pleadings described its muffler design as "a glass pack muffler adapted with butterfly valve in the core . . . that can be opened and closed by either manual or electronic means" from the vehicle's cabin, thereby causing "the muffler noise

[to] become[] progressively quieter as the valve is closed” and “progressively louder as the [valve] is opened.” Plaintiff alleged “[w]hen the valve is in a fully open position, the muffler noise is no louder than the muffler noise from the same type of muffler without a valve.”

In 2002, defendant purportedly agreed to manufacture mufflers according to plaintiff’s design “for sale and distribution by plaintiff for use on automobiles.” After some production delays, defendant built a small number of mufflers and sent them to plaintiff. But in September 2004, defendant informed plaintiff that it had decided to no longer manufacture the mufflers and refused to fill any additional purchase orders.

Plaintiff sued defendant alleging several causes of action, which included breach of contract. Defendant’s answer included an affirmative defense alleging “the contract . . . is for the sale of a product . . . that [is] not permitted to be manufactured or sold in California and therefore . . . was for an illegal purpose” The parties then agreed to bifurcate and try the issue of whether plaintiff’s muffler design violated section 27150(a).

Defendant’s first witness was Peter Giacobbi, an automotive engineer. Giacobbi concluded plaintiff’s muffler was “equipped with an internal bypass” because the valve “regulate[d] the proportion of gases that are flowing through the perforations and in the absorbant [*sic*] material.”

The second witness called by defendant was Jack Schwendener, a retired California Highway Patrol employee and licensed mechanical engineer. Schwendener opined that plaintiff’s muffler contained a bypass and violated section 27150(a) because “the purpose of [the butterfly valve] is to change the tone of the muffler to change the path so that it would bypass some or all of the sound attenuating material” “With the valve in the closed position, the exhaust gas would be directed through the perforations[,] through the sound-absorbing material[,] back through the perforation[,] and out through the exit,” but “[w]ith the butterfly [valve in] the open position, the

exhaust gases would travel directly through the perforated pipe [and] only a miniscule amount of flow would go through the sound-absorbing material.”

Plaintiff called one witness, Ian Fettes, a mechanical engineer. Fettes described plaintiff’s muffler as containing “a modulating valve because what it’s really doing is modulating the percentage of gas that flows in areas of the muffler.” He claimed the valve “changes the way that the exhaust flows through the muffler.” “The same gas goes in and goes out,” but the valve “modifies the way [the gas is] distributed through the muffler.”

The court found “the nature and function of the SBD muffler . . . meets the definition of a muffler equipped with a ‘cutout, bypass or similar device’ under . . . § 27150(a),” noting plaintiff’s “muffler permitted [a] driver to change the noise level of the exhaust system while it was in operation.” In so ruling, the court concluded the words “‘cutout, bypass or similar device’ were common terms . . . and that a lay person . . . would know what to do to comply with the statute”

Defendant then moved for judgment on the pleadings. Citing section 27150.1, which makes it illegal for persons in the business of selling motor vehicle exhaust systems to “offer for sale, sell, or install, a . . . system, . . . including, . . . a muffler, unless it meets the regulations and standards applicable pursuant to this article,” defendant argued the parties’ alleged agreement to manufacture plaintiff’s muffler was an illegal contract. The trial court granted the motion with leave to amend, ruling “mufflers of this type cannot be sold in the State of California,” but plaintiff could allege “the subject mufflers were to be sold out-of-state, or to users of off-road vehicles participating in sanctioned races as contemplated by [section] 27150[, subdivisions] (b) or (c)”

Plaintiff filed a second amended complaint and the trial court overruled defendant’s demurrer to it. But the parties then stipulated to vacate the ruling and enter an order sustaining the demurrer without leave to amend “[t]o facilitate an

appeal . . . following a determination of . . . critical . . . issues adverse to plaintiff” The stipulation also provided for entry of a judgment in defendant’s favor on its cross-complaint conditioned on staying its enforcement until resolution of this appeal and permitting an offset of the damages awarded in the cross-action against any possible future award in plaintiff’s favor. The trial court entered a final judgment pursuant to the parties’ stipulation and this appeal followed.

DISCUSSION

1. Section 27150(a)

First, plaintiff contends the trial court erred by finding its muffler design violates section 27150(a).

That statute declares, except for certain vehicles subject to statutes governing off-highway motor vehicles and racing events (§ 27150, subs. (b) & (c)), “[e]very motor vehicle subject to registration shall at all times be equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise, and no muffler or exhaust system shall be equipped with a cutout, bypass, or similar device.” (§ 27150(a).) Neither party cites any decisional law or state regulatory provision defining what is meant by the phrase “cutout, bypass, or similar device” or construing this part of the statute.

The trial court conducted a trial on whether plaintiff’s muffler design violated section 27150(a), receiving evidence including the opinions of expert witnesses on the issue. “‘It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact[.]’” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881), and “‘[w]hen a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any

substantial evidence contradicted or uncontradicted which will support the finding of fact.’ [Citations.]” (*Ibid.*)

Plaintiff contends the trial court’s ruling is subject to de novo review because the “issue of whether the SBD Muffler violates . . . [s]ection 27150(a) involves a judicial interpretation of ‘cutout, bypass or similar device,’” and “[t]he essential facts concerning the . . . [m]uffler are not in dispute.” Generally, “[t]he construction of a statute and its applicability to a given situation are matters of law to be determined by the court. [Citations.]” (*Estate of Madison* (1945) 26 Cal.2d 453, 456-457.)

Defendant argues plaintiff’s muffler violates section 27150(a), claiming a “device only needs to ‘vary the gas flow’ or provide an alternative channel through which gas may flow” to constitute a “bypass[] or similar device” under the statute, and “the SBD Muffler contains two alternative channels” regulated by the butterfly valve. It contends, “[i]f the ‘main way’ for the gas to flow . . . is straight through and out the back of the muffler with the butterfly valve open, then the ‘auxiliary to the main way’ is through the sound-absorption portion of the muffler with the valve closed”; and “[c]onversely, if the ‘main way’ for the gas to flow . . . is through the sound-absorption portion of the muffler with the valve closed, then the ‘auxiliary to the main way’ is straight through the back of the muffler with the valve open.”

Here, each party presented the testimony of an expert on the muffler’s operation. Giacobbi and Fettes disagreed on whether the butterfly valve incorporated into plaintiff’s muffler created a bypass. Determinations concerning the credibility of witnesses in general (*Orange County Employees Assn. v. County of Orange* (1988) 205 Cal.App.3d 1289, 1293) and the qualifications of expert witnesses in particular are matters for the trier of fact. (*In re Katrina W.* (1994) 31 Cal.App.4th 441, 447.) The opinion of a single expert witness, even if contradicted by other experts, can suffice to support a finding. (*Smith v. Workmen’s Comp. App. Bd.* (1969) 71 Cal.2d 588, 592.)

Both the law and the evidence presented at trial supports the court's conclusion. "In construing a statute, our task is to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment," by "first [looking] to the words of the statute," "constru[ing] the[m] . . . in context, and harmoniz[ing] the various parts of an enactment by considering the provision . . . in the context of the statutory framework as a whole. [Citations.]" (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.)

The apparent purpose of section 27150(a) is to limit the amount of noise emitted from a motor vehicle. The Vehicle Code defines a muffler as "a device consisting of a series of chambers or baffle plates, or other mechanical design, for the purpose of receiving exhaust gas from an internal combustion engine, and effective in reducing noise." (§ 425.) Section 27150(a) also bars the use of a muffler creating "excessive or unusual noise." These provisions, plus section 27150(a)'s requirement that a muffler be "in constant operation and properly maintained to prevent any excessive or unusual noise" and not "be equipped with a cutout, bypass, or similar device," establishes the muffler designed by plaintiff violates the statute.

At trial, defense counsel read two dictionary definitions of the term bypass. The first, from a standard dictionary, defined it as "'a way, a pipe, a channel . . . between two points that avoids or [is] an auxiliary to the main way.'" The second definition, from a dictionary of terms commonly used in the automotive industry, defined a bypass as "'a passage through which gas or liquid may flow instead of or in addition to its main channel'" Both Giacobbi and plaintiff's expert, Fettes, agreed with these definitions. In addition, Giacobbi agreed with the regulatory definition of cutout, bypass or similar devices implemented under the federal Noise Control Act of 1972 (42 U.S.C. § 4901 et seq.) as "devices which vary the exhaust system gas flow so as to discharge the exhaust gas and acoustic energy to the atmosphere without passing through the entire length of the exhaust system, including all exhaust system sound attenuation components." (40 C.F.R. § 202.10(d) (1974).)

Plaintiff questions defendant's use of the dictionary definitions, arguing they "are not content specific to mufflers or exhaust systems" and "make[] no sense" when applied to its muffler. It further contends "[t]he practical and common sense meaning of 'cutout, bypass or similar device' in the context of mufflers and exhaust systems is something that redirects the exhaust so that it does not pass through the muffler." But, as noted, plaintiff's expert agreed with the definitions defendant cited at trial, one of which came from a dictionary authorized by the Society of Automotive Engineers. Neither of these definitions, nor the federal regulation cited by plaintiff, requires a bypass to entirely circumvent the muffler.

Alternatively, citing the federal Noise Control Act's definition of a cutout, bypass or similar device, plaintiff argues "[s]ection 27150(a) cannot be in conflict with the federal regulations, nor can it be construed in any manner that would conflict with the regulations." This claim lacks merit.

Plaintiff cites a federal regulation declaring, "No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable unless the exhaust system of such vehicle is (a) free from defects which affect sound reduction; (b) equipped with a muffler or other noise dissipative device; and (c) not equipped with any cut-out, bypass, or similar device." (40 C.F.R. § 202.22 (1974); see also 42 U.S.C. § 4917(c)(1) ["no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of [a] motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section"].) But, insofar as motor vehicles are concerned, the federal Noise Control Act applies to "motor carriers engaged in interstate commerce" (42 U.S.C. § 4917(a)(1); see also 40 C.F.R. § 202.10(l) (1974).) Furthermore, as for products that emit noise covered by the Act, "nothing in this section precludes or denies the right of any State or political subdivision thereof to establish and enforce controls on environmental noise (or one or more sources thereof)

through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products.” (42 U.S.C. § 4905(e)(2).) Thus, plaintiff’s claim federal law preempts the trial court’s construction of section 27150(a) fails.

2. Illegal Contract

As noted, the trial court, relying on section 27150.1, granted defendant’s motion for judgment on the pleadings finding the parties’ contract to manufacture mufflers using plaintiff’s design was illegal to the extent plaintiff intended to sell the mufflers for use on registered vehicles in California. Section 27150.1 declares, “No person engaged in a business that involves the selling of motor vehicle exhaust systems, or parts thereof, including, but not limited to, mufflers, shall offer for sale, sell, or install, a motor vehicle exhaust system, or part thereof, including, but not limited to, a muffler, unless it meets the regulations and standards applicable pursuant to this article.”

Plaintiff attacks this ruling on two grounds. First, it contends the parties’ manufacturing contract is not illegal because “[t]here is no [applicable] regulation or standard . . . that makes it unlawful for an exhaust system, including a muffler, to have a ‘cutout, bypass or similar device’ . . . prohibited by [s]ection 27150(a).” Second, it notes the parties’ contract was not limited to vehicles subject to California registration and, since section 27150(a) does not apply to statutorily exempt vehicles within the state or vehicles outside of California, the trial court erred in finding the contract had an illegal object. Both contentions lack merit.

Plaintiff claims the statute’s reference to “a regulation or standard” is limited to administrative directives “adopted by state agencies,” thereby rendering section 27150(a), “a statute,” inapplicable, and argues “[t]here is no [other] regulation or standard applicable to Article 2 that makes it unlawful for an exhaust system, including a muffler, to have a ‘cutout, bypass or similar device’”

This interpretation of section 27150.1's language is too narrow. Case law construing the requirements of section 27150(a) and the provisions of other statutes contained in Article 2 describe the statutory requirements as standards. (*People v. Gibbs* (1971) 16 Cal.App.3d 758, 763 [referring to requirements of section 27153.5, which concern the discharge of motor vehicle exhaust, as "standards to be applied in enforcing section 27153"]; *Smith v. Peterson* (1955) 131 Cal.App.2d 241, 244 [in rejecting due process challenge to validity of section 27150(a)'s and section 27150.1's predecessor statutes, former section described as fixing the "standard of . . . originally installed mufflers"].)

In support of its interpretation of the phrase "regulation or standard," plaintiff cites the definition of "regulation" appearing in Government Code section 11342.600, which uses both terms to describe rules "adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it" But that definition applies only within the Administrative Procedure Act. (Gov. Code, §§ 11340 et seq., 11342.510.) That act does not apply to "legislative enactments." (*Lauderbach v. Zolin* (1995) 35 Cal.App.4th 578, 585.)

Furthermore, plaintiff's construction would lead to an absurd result. Under the rules of statutory construction, "a court may determine whether the literal meaning of a statute comports with its purpose," and "need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.' [Citations.]" (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340; see also *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.) Section 27150.1 bars the sale and installation of any part of an exhaust system, including a muffler, "unless it meets the regulations and standards applicable pursuant to this article." This phrase refers to the Legislature's related enactments, not administrative directives issued by a state agency.

Finally, to the extent it is necessary, the legislative history of section 27150.1 reflects that the Legislature intended it apply to statutorily-created regulations and standards. As originally enacted, the statute referred to “regulations and standards adopted by the commissioner [of the California Highway Patrol]” (Stats. 1971, ch. 1769, § 1, p. 3823.) The current version, requiring exhaust system sales and installation “meet[] the regulations and standards applicable pursuant to this article,” was enacted in 2002. (Stats. 2002, ch. 569, § 2.) “[A]n amendment making a material change in the phraseology of a statute is ordinarily viewed as showing an intention on the part of the Legislature to change the meaning of the provision” (*Twin Lock, Inc. v. Superior Court* (1959) 52 Cal.2d 754, 761; *Jordan v. Consolidated Mut. Ins. Co.* (1976) 59 Cal.App.3d 26, 48 [“amendment . . . making a material change in . . . wording bespeaks a legislative intent to change the meaning of the prior statute”].) The amendment’s elimination of the reference to the California Highway Patrol’s regulatory authority and replacement of it with reference to the article of the Vehicle Code governing exhaust systems reflects the Legislature intended section 27150.1 to incorporate the statutorily-created regulations and standards.

Alternatively, plaintiff notes the parties’ contract was not limited to the sale or installation of its muffler on registered vehicles in California and argues “to the extent the . . . mufflers were to be sold . . . for use in other states or countries” or by California owners of statutorily “exempt vehicles,” “the object of the parties’ contract could in no way be deemed unlawful” While true, plaintiff waived its right to assert this argument by stipulating to the dismissal of this action to expedite the current appeal. “[W]here a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal. [Citations.] Similarly, an appellant waives his right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal. [Citations.]” (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501; see also

9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 395, p. 453.) By stipulating to a dismissal of its action after the trial court overruled defendant's demurrer to the second amended complaint, plaintiff waived its right to assert this aspect of its illegal contract theory. Thus, plaintiff's attack on the trial court's illegal contract finding fails as well.

3. *Commerce Clause*

Claiming manufacturers will have to construct special mufflers for the California market, plaintiff contends "the trial court's 'no sound modulating device' rule," will "cause a significant restraint on trade in violation of the [federal Constitution's] Commerce Clause" Not so.

"The federal Constitution's commerce clause grants Congress the authority '[t]o regulate commerce . . . among the several states[.]' (U.S. Const., art. I, § 8, cl. 3.) This grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of states to enact legislation affecting interstate commerce. [Citations.]" (*People ex rel. Brown v. PuriTec* (2007) 153 Cal.App.4th 1524, 1530-1531.) Thus, to avoid economic protectionism, the United States Supreme Court has held a state law violates the dormant commerce clause where it either "discriminates against interstate commerce" without "advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" or, absent any discriminatory effect, "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." [Citation.]" (*Department of Revenue of Ky. v. Davis* (2008) ___ U.S. ___, ___ [128 S.Ct. 1801, 1808; 170 L.Ed.2d 685].)

As the trial court's rulings reflect, section 27150(a) does not discriminate between glass pack muffler sellers located in California and those located outside of the state. Nor is plaintiff barred from manufacturing and selling its muffler altogether. The trial court found plaintiff could enforce its contract with defendant to the extent its mufflers are sold out-of-state or to persons operating exempt vehicles in California.

Further, plaintiff concedes “[s]ection 27150(a) arguably . . . address[es] a matter of public health—excessive vehicle noise from mufflers and exhaust systems.” “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.]” (*Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142 [90 S.Ct. 844, 25 L.Ed.2d 174].)

While plaintiff claims the trial court’s construction of section 27150(a) will place a disproportionate burden on interstate commerce, it provides no support for this argument. In fact it acknowledges defendant’s assertion that as many as 45 other states have laws similar to section 27150(a). Thus, plaintiff has failed to show the law imposes an excessive burden on interstate commerce.

4. Supremacy Clause

Next, plaintiff contends the trial court’s interpretation of section 27150(a) renders it preempted by the federal Noise Control Act. (42 U.S.C. § 4901 et seq.) As discussed above, the act only applies to commercial motor carriers. (40 C.F.R. §§ 202.12 & 202.22.) There is no evidence plaintiff’s muffler was intended to be installed on vehicles subject to the federal act. Defendant notes in addition that Title 42 United States Code section 4905(e)(2) provides another exemption from federal regulation for “controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products.” Thus, plaintiff’s supremacy argument is unavailing.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.